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No.

IN THE
SUPREME COURT OF THE UNITED STATES

In Re Video-Cinema Films, Inc.
Petitioner

ON PETITION FOR A WRIT OF MANDAMUS TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

May the U.S. Court of Appeals for the Second Circuit ignore three stipulations created and endorsed as Orders by its staff counsel, which unambiguously grant Petitioner the right to challenge attorneys' fees awards in three copyright cases after the entry of a final judgment adjudicating the amount of the fees, each providing that "[t]his stipulation shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded by the District Court"?

PARTIES TO THE PROCEEDING

The parties to this action are:

1. Video-Cinema Films, Inc., Petitioner/Plaintiff below, a one-man, New York, close corporation, owned and operated by Mr. Larry Stern of New York, NY.
2. The United States Court of Appeals for the Second Circuit, to whom the *Mandamus* is directed.
3. Cable News Network, Inc. d/b/a CNN, Defendant below, a subsidiary of Time Warner, Inc., a publicly traded corporation.
4. American Broadcasting Companies, Inc., Defendant below, operates ABC Television Network, a subsidiary of Walt Disney Corporation, a publicly traded entity.
5. CBS Corporation, Defendant below, is the indirect parent corporation of the CBS Television Network, which is a subsidiary of Viacom, Inc., a publicly traded corporation.

TABLE OF CONTENTS

QUESTION PRESENTED 2
PARTIES TO THE PROCEEDING 3
TABLE OF CONTENTS 4
TABLE OF AUTHORITIES 5
STATEMENT OF JURISDICTION 7
OPINIONS BELOW 8
STATUTES AND RULES INVOLVED 10
STATEMENT OF THE CASE 12
ARGUMENT 15
THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT CANNOT IGNORE THREE STIPULATIONS IT ENDORSED AS ORDERS. EACH UNAMBIGUOUSLY STATES THAT "THIS STIPULATION SHALL NOT PRECLUDE ANY APPEAL FROM A FINAL JUDGMENT WHICH ADJUDICATES THE PRECISE AMOUNT OF ANY ATTORNEYS' FEES AWARDED BY THE DISTRICT COURT." 15
RELIEF REQUESTED 19
CONCLUSION 20
APPENDIX A-1

TABLE OF AUTHORITIES

Cases	Page
Lichtenberg v. Besicorp Group, Inc., 204 F.3d 397 (2d Cir. 2000).	18
Moore v. South Carolina Labor Board, 100 F.3d 162 (D.C. Cir. 1996).	15,16,17
Rezzonico v. H & R Block, Inc., 182 F.3d 144 (2d Cir. 1999).	17
United States of America ex rel. McAllan v. City of New York, 248 F.3d 48 (2d Cir. 2001).	18
Ex parte Bradley, 74 U.S. 364 (1868).	7
Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962).	16
Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989).	16,17,18
Thompson v. INS, 375 U.S. 384 (1964).	16
Wolfsohn v. Hankin, 376 U.S. 203 (1964).	16

Statutes	**Page**
Title 28 U.S.C. § 1651(a)	7,10
Title 17 U.S.C. § 505	12
Federal Rules of Civil Procedure	
Fed. R. Civ. P. § 54(d)(2)(B)	10,12,19
Fed. R. Civ. P. § 58(a)(1)	10
Fed. R. Civ. P. § 58(a)(1)(C)	14
Fed. R. Civ. P. § 58(b)(2)	11,18
Fed. R. App. P. § 4(a)(1)(A)	13,14

STATEMENT OF JURISDICTION

This Petition for a Writ of Mandamus arises from a decision of the United States District Court for the Southern District of New York, Jones, J., awarding attorneys' fees to Defendants in three copyright suits, and the subsequent dismissal of Petitioner's appeals of these attorneys' fees rulings by the United States Court of Appeals for the Second Circuit.

The All Writs Act, 28 U.S.C. § 1651(a), forms the statutory basis for the general power of this Court to issue a *Writ of Mandamus* directed to lower federal courts handling civil actions.

Petitioner has standing since it is the affected party in the proceedings below. The U.S. Court of Appeals for the Second Circuit denied Petitioner the right to perfect its appeals and subsequently denied its motions for rehearing and rehearing *en banc* on March 7, 2005. As a result, Petitioner has exhausted all other remedies below.

A *Writ of Mandamus* is applicable in the supervision of the proceedings of lower courts in cases where there is a legal right without any existing legal remedy. *Ex parte Bradley*, 74 U.S. 364 (1868).

This petition is timely because under Supreme Court Rule 30 it was filed within ninety days of March 7, 2005, the date the U.S. Court of Appeals for the Second Circuit denied reconsideration of Petitioner's appeals.

OPINIONS BELOW

NOTE: In the interest of conserving judicial resources, Petitioner is submitting a single Petition for the *Writ of Mandamus*, even though the U.S. District Court issued three separate attorneys' fees awards, and the U.S. Court of Appeals for the Second Circuit endorsed three stipulations as Orders, as explained below.

Dismissal of Motions for rehearing and rehearing *en banc* by Second Circuit:

Video-Cinema Films, Inc. v. American Broadcasting Companies, Inc., No. 04-3197-cv (March 7, 2005) (Appendix at 2)

Video-Cinema Films, Inc. v. CNN, Inc., No. 04-3196 (March 7, 2005) (Appendix at 5)

Video-Cinema Films, Inc. v. CBS, No. 04-3199 (March 7, 2005) (Appendix at 8)

Dismissal of Appeal by Second Circuit:

Video-Cinema Films, Inc. v. Cable News Network, Inc., Nos. 98-cv-7128, 98-cv-7129, 98-cv-7130 (November 24, 2004) (Appendix at 18)

Decision of the District Court awarding attorneys' fees to the Defendants:

Video-Cinema Films, Inc. v. Cable News Network, Inc. d/b/a CNN, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2004 U.S. Dist. LEXIS

1428, Copy.L.Rep. (CCH) P28, 754 (S.D.N.Y. February 3, 2004) (Appendix at 29)

Decision of the District Court granting summary judgment to the Defendants:

Video-Cinema Films v. Cable News Network, Inc., 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2001 U.S. Dist. LEXIS 15937, 60 U.S.P.Q.2d (BNA) 1415, Copy.L.Rep. (CCH) P28,327, 29 Media L.Rep. 2551 (S.D.N.Y. September 28, 2001).

STATUTES AND RULES INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a) states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rule of Civil Procedure 54(d)(2)(B) states:

> Unless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of agreement with respect to fees to be paid for the services for which claim is made.

Federal Rule of Civil Procedure 58 states:

> (a) Separate Document
>
> (1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:
>
> ...
>
> (C) for attorneys fees under Rule 54.
>
> ...
>
> (b) Time of Entry
>
> Judgment is entered for purposes of these rules:
>
> ...

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) when it is set forth on a separate document, or

(B) when 150 days have run from entry in the civil docket under Rule 79(a).

STATEMENT OF THE CASE

Video-Cinema Films, Inc. (hereinafter "Video-Cinema" or "Petitioner") brought action for copyright infringement and other claims against CNN, CBS and ABC (hereinafter "Defendants"), for the unlicensed use of images of Robert Mitchum, as excerpted from the motion picture *The Story of G.I. Joe,* that were used in Mitchum's obituaries in 1997.

Video-Cinema seeks an opportunity to perfect its appeals before the U.S. Court of Appeals for the Second Circuit. The basis for the appeal will be that U.S. District Judge Barbara S. Jones awarded attorneys' fees to the Defendants, disregarding the plain language of Fed. R. Civ. P. 54(d)(2)(B) (motion for attorneys' fees must be filed within 14 days of entry of judgment). Judge Jones permitted the Defendants to file a Motion for attorneys' fees 19 days after the district court issued its judgment, in disregard of the time limits set in Rule 54(d)(2)(B). The judge also disregarded the prescription of the Rule, requiring a movant to state the amount of fees being sought or a fair estimate thereof, which Defendants failed to do.

Defendants never invoked Fed. R. Civ. P. 54 in seeking fees. The district court's decision does not refer to any Federal Rule of Civil Procedure, either. The motion is based solely on the Copyright Act, 17 U.S.C. § 505, in disregard of Fed. R. Civ. P. 54(d)(2)(B).

In 2001, the District Court granted the Defendants' motion for summary judgment. *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ) (S.D.N.Y. 2001) (Appendix at A29).

Petitioner filed notices of appeals of any attorneys' fees awards. On August 3, 2004, at a CAMP conference with the Second Circuit's counsel Stanley A. Bass, Esq., the petitioner's notices of appeal were withdrawn as premature, with the Court providing the assurance that Video-Cinema could file its appeals once final judgments adjudicating the precise amount of fees were entered. The Court endorsed with a "SO ORDERED" the Stipulations Withdrawing Premature Appeal, each of which provided that "it shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded ..." (Appendix at A23-28)

On February 3, 2004, the District Court, Judge Barbara S. Jones, awarded Defendants CNN, ABC, and CBS a total of $299,790.09 in attorneys' fees. *See Video-Cinema Films, Inc. v. Cable News Network, Inc.* d/b/a CNN, 98 Civ. 7128 (BSJ), 98 Civ. 7129 (BSJ), 98 Civ. 7130 (BSJ), 2004 U.S. Dist. LEXIS 1428, Copy.L.Rep. (CCH) P28, 754 (S.D.N.Y. 2004). The District Court initially determined only the awards to CNN and ABC, and subsequently determined the award for CBS. These amounts were not entered as final judgments in the district court until March 8, 2005 (ABC and CNN) and March 23, 2005 (CBS). (Appendix at A12-17)

On April 19, 2004, Petitioner filed three notices of appeal to the U.S. Court of Appeals for the Second Circuit specifically noting that the notices are effective upon the entry of a final judgment in each case, pursuant to the stipulations' express language and Fed. R. App. P. 4(a)(2), *Filing Before Entry of Judgment*. (Appendix at 20-22)

The District Court issued rulings regarding the fee amounts on February 3, 2004 (CNN and ABC) and on February 19, 2004 (CBS). Despite the existence of

the endorsed stipulations of August 2003, no Defendant had filed, or moved for, the entry of a final judgment regarding its award.

On November 24, 2004, the U.S. Court of Appeals for the Second Circuit dismissed Petitioner's appeals as untimely, stating that Petitioner:

> did not file notices of appeals within thirty days after the entry of the district court's orders granting the appellees attorneys' fees. *See* Fed. R. App. P. 4(a)(1); *see also* Fed. R. Civ. P. 58 (a)(1)(C) (a separate document is not required for an order disposing of a motion for attorneys' fees). This Court may not extend the time for Appellant to file a notice of appeal. *See* Fed. R. App. P. 26(b)(1).

See Dismissal from U.S. Court of Appeals for the Second Circuit. (Appendix at A18-19)

Video-Cinema seeks a *Writ of Mandamus* against the Second Circuit so that it will abide by its Orders dated August 4 and 5, 2003, allowing Petitioner to perfect its appeals. The language of the Orders is unambiguous, expressly granting Petitioner the right to file its appeals after the entry of *final judgments* adjudicating the amounts of attorney's fees awarded (and not final orders). The final judgments were not entered until almost a year following the filing of Petitioner's notices of appeal in April 2004.

ARGUMENT

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT CANNOT IGNORE THREE STIPULATIONS IT ENDORSED AS ORDERS. EACH UNAMBIGUOUSLY STATES THAT "THIS STIPULATION SHALL NOT PRECLUDE ANY APPEAL FROM A FINAL JUDGMENT WHICH ADJUDICATES THE PRECISE AMOUNT OF ANY ATTORNEYS' FEES AWARDED BY THE DISTRICT COURT."

The U.S. Court of Appeals for the Second Circuit cannot simply ignore its Orders. Here, the court endorsed three stipulations as Orders, each stating that "[t]his stipulation shall not preclude any appeal from a final judgment which adjudicates the precise amount of any attorneys' fees awarded by the District Court." (Appendix at A23-28)

The Circuit's Orders entered November 24, 2004, dismissing the appeals, make no mention of the court's stipulated Orders dated August 4 and 5, 2003, which grant Petitioner the right to file its appeal "from a final judgment which adjudicates the precise amount of any attorney's fees awarded by the District Court." (Appendix at A23-28)

The "Unique Circumstances" Doctrine Applies and Binds a Court to Honor its Orders

In *Moore v. South Carolina Labor Board*, 100 F.3d 162 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit considered whether the "unique circumstances" doctrine may be invoked to excuse a party's failure to

file a timely notice of appeal, where the party missed the applicable deadline by relying on erroneous information received from the clerk's office staff. There, the court concluded that the "unique circumstances" doctrine applies only "where a party who could have filed a timely notice of appeal is lulled into missing the deadline by a formal *court order or ruling*, containing specific assurances that action which extends or postpones the deadline has properly been taken." *Moore,* 100 F.3d at 162 (emphasis added).

The Supreme Court has recognized a narrow exception, known as the "unique circumstances" doctrine, under which appellate courts will excuse an untimely notice of appeal where the appellant could have filed a timely notice but was misled to delay filing by a court order or ruling which purportedly extended or tolled the appeal deadline. *Moore,* 100 F.3d at 162. *See, e.g., Wolfsohn v. Hankin*, 376 U.S. 203 (1964); *Thompson v. INS*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

The initial Supreme Court cases in this regard involved court rulings or orders that explicitly – although erroneously – extended the deadline for filing a notice of appeal, or the deadline for filing a post-judgment motion, which tolled the time for noting an appeal. *See Wolfsohn*, 376 U.S. at 203-04; *Thompson*, 375 U.S. at 385-87; *Harris Truck Lines, Inc.*, 371 U.S. at 216-17.

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), however, the Court was called upon to decide whether a litigant was entitled to rely on a court's mere acceptance and processing of an untimely notice of appeal. In holding that the unique circumstances doctrine did not apply in that instance, the Court explained that the exception applies "only where a

party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.* at 179. *Osterneck* thus clarified that to qualify for the unique circumstances exception, the judicial action relied upon must include some affirmative assurance which, if proper, would have extended or postponed the deadline for filing the notice of appeal.

In *Moore*, however, the District of Columbia did not find a basis for applying the doctrine. Although the statements made by the clerk's office staff may have constituted specific assurances, they could not fairly be characterized as official judicial action. With the exception of one case, application of the unique circumstances exception has been limited to situations involving written court orders or oral rulings made during the course of a hearing. 100 F.3d at 164.

The District of Columbia Circuit determined that application of the unique circumstances exception has by and large been limited to formal court action, as a formal order or ruling (1) generates the highest level of justifiable reliance, and (2) raises virtually no possibility of evidentiary problems for appellate courts faced with applying the exception. *Id.*

The Second Circuit cited *Moore* in *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999). In *Rezzonico*, the U.S. Court of Appeals held that for the "unique circumstances" doctrine to apply, "*'Judicial officer' means a judge or a member of a judge's staff empowered to speak in the judge's behalf.*" *Rezzonico*, 182 F.3d at 152 (emphasis added). This is clearly the case here.

Petitioner relied upon the August 4 and 5, 2003 stipulations endorsed as Orders since they were prepared and executed by the *staff counsel* of the Circuit Court who supervised and controlled their

execution. The Orders explicitly state that they do not "preclude any appeal from a *final judgment*" that determines the amount of legal fees awarded, giving Petitioner an unambiguous "specific assurance" that an appeal can be taken against a final judgment. (emphasis added.) The language of the Orders specifically refers to an appeal following "a final judgment." Petitioner should be able to rely on these Orders and have its notices of appeal considered timely filed in light of the Second Circuit's Orders specifically granting Petitioner the right to appeal final judgments (and not orders). Petitioner's appeal notice was well within the 150-day period of Fed. R. Civ. P. 58(b)(2).

Other cases involving the doctrine of unique circumstances in the Second Circuit have dealt with post-judgment motions before the district courts and whether the appeals were timely filed. *See, e.g., United States of America ex rel. McAllen v. The City of New York*, 248 F.3d 48 (2d Cir. 2001); *Lichtenberg v. Besicorp Group, Inc.*, 204 F.3d 397 (2d Cir. 2000). The facts of this case are distinguishable since it is based on an Order endorsed by staff counsel who controlled its preparation and supervised its execution. Having endorsed the stipulation as an Order, staff counsel acted in the capacity of a "judicial officer", as this phrase is used in *Osterneck*, 489 U.S. at 179. Since Petitioner relied on the Orders and actions of the Second Circuit's staff counsel, this case falls under the protection of the unique circumstances doctrine. The *Writ of Mandamus* is necessary for the Court of Appeals to abide by the language of its Orders governing the appeals.

RELIEF REQUESTED

Petitioner seeks the *Writ of Mandamus* against the U.S. Court of Appeals for the Second Circuit, which denied Petitioner's Appeal of the attorneys' fees awards despite the above-mentioned Orders permitting an appeal of such an award after a "final judgment." This relief is not available in any other court, because Video-Cinema has exhausted its appeals rights in this matter below.

Video-Cinema wishes to perfect its appeal of the attorneys' fees awards according to the Second Circuit's Orders. The U.S. Court of Appeals for the Second Circuit must abide by its mandates of August 4 and 5, 2003, and permit Video-Cinema to perfect its appeal within 30 days of this honorable Court issuing the *Writ of Mandamus*.

Petitioner has a valid basis for appealing the attorneys' fees awards, and respectfully submits that the District Court should have denied the attorneys' fees at issue because Defendants failed to comply with Fed. R. Civ. P. 54(d)(2)(B).

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this honorable Court to permit Petitioner's appeal of the attorneys' fees awards. The U.S. Court of Appeals for the Second Circuit, by the "SO ORDERED" on the parties' stipulations, created the expectation that an appeal of any attorneys' fees award would occur after a final judgment. The Defendants failed to comply strictly with the Federal Rules of Civil Procedure, and the appeal of the attorneys' fees should come as no surprise.

Respectfully submitted,

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